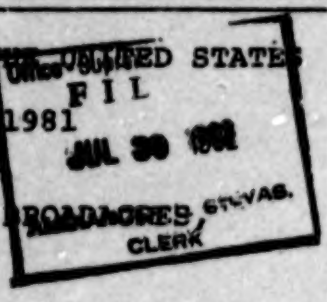
No. 81-2383

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981



BOSWELL, INC. d/b/a BROADMOORE,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee,

AND

BOSWELL, INC. d/b/a RENO COUNTY ADULT CARE HOME,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

APPENDIX TO
MOTION TO DISMISS

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APPENDIX

BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

In The Matter Of The Licensure
And Certification Of The
Broadacres Adult Care Home 80-1
Of Hutchinson, Kansas

DENIAL ORDER FOR LICENSURE AND CERTIFICATION

Now on this 7th day of January, 1980, the Secretary of the Kansas Department of Health and Environment, Joseph F. Harkins, considers the application filed on October 25, 1979, by the operators of the subject facility for a license to operate an intermediate care adult care home and also their application for certification as meeting Medicaid Regulatory Requirements filed on or about October 31, 1979.

The Secretary finds, upon further examination of his files, that the facility was inspected, or surveyed, on November 13 and 14, 1979, for purposes of licensure and certification; the results of that inspection were provided to the administrator of the facility during a so-called "exit interview" on November 21, 1979. A report of that inspection has been submitted to the Secretary's office and is before the Secretary.

The Secretary finds that the application for licensure of the Broadacres Adult Care Home should be denied for the reason that the facility is in substantial failure to comply with the requirements, standards and regulations promulgated by the Secretary. The Secretary finds that the applicant is not in substantial compliance with the following state licensure regulations:

1. K.A.R. 28-39-31 Licensing procedure; (F) Modification of structure. Letter of approval for change of physical therapy room, clean utility room and soiled utility room is not on file in facility.
2. K.A.R. 28-39-33 Administration; (A) Management. Policies and procedures are available but do not always fit this particular facility and cannot be used as written.
3. K.A.R. 28-39-33 Same; (C) Personnel Policies and Procedures. Some of the job descriptions need to be revised to fit this facility.
4. K.A.R. 28-39-33 Same; (D) Staff development. Orientation for all new employees besides nursing personnel needs to be done and

kept on file.

5. K.A.R. 28-39-33 Same; (D) Staff development. Personnel records need to be kept current as to placement of employees, orientation to other areas when employee changed positions, termination and employment dates.

6. K.A.R. 28-39-33 Same; (E) Use of outside resources and (F) Admission policy. Mentally retarded resident is retained in facility and appropriate program is not [illegible].

7. K.A.R. 28-39-33 Same; (K) Development and review of resident care policies. Resident care policies have not been reviewed and revised by the professional advisory board to fit this facility. Person responsible in

writing such policies is not qualified.

8. K.A.R. 28-39-33 Same; (J) Resident rights. Window curtains do not provide privacy at all times.

9. K.A.R. 28-39-36 Rehabilitative services; (B) Provision of services. Occupational Therapist's contract states she will be in facility two or three hours each two months--has only provided one hour every two months.

10. K.A.R. 28-39-38 Activities services; (A) Programming. Activity Plan and Program needs to be expanded to meet the needs and interests of each resident.

11. K.A.R. 28-39-38 Same; (A) Same; Activity plan of care is not developed as a useful tool for resident care.

12. K.A.R. 28-39-39 Physician services; (C) Resident supervision by physician and K.A.R. 28-39-42 Pharmaceutical services (D) Review. One resident record, checked, lacked physician's progress note and one lacked physician's review of medications every 60 days. (Corrected on November 21, 1979)

13. K.A.R. 28-39-40 Health services; (A) Health services supervisor. Unable to verify that Health Service Supervisor is working full time (time clock not working properly is part of the problem).

14. K.A.R. 28-39-40 Same; (D) Nursing home aide qualifications. All nurse aides are not qualified by training and copies of certificates are not always on file to verify training.

15. K.A.R. 28-39-41 Dietetic; (B) Nutrition and Menu Planning. Tray identification system needs to be left on trays (therapeutic), to insure diet is taken as ordered.

16. K.A.R. 28-39-41 Same; (B) Same. Food supplies are not always on hand to serve diets as ordered. Equal substitution for caloric and nutritional content needs to be made.

17. K.A.R. 28-39-41 Same; (B) Same. Standardized recipes need to be used for number of residents in the facility.

18. K.A.R. 28-39-41 Same; (D) Preparation and service. Ice machine needs to be repaired or replaced. Rinse faucet at dishwasher needs to be repaired or replaced. Toaster needs to be repaired or

replaced. (Repaired as of November 21, 1979.)

19. K.A.R. 28-39-41 Same; (D) Same. Steam table needs to keep hot food at 140°F.

20. K.A.R. 28-39-42 Pharmaceutical services. a. Stop order policy does not specify narcotic stoppage.

b. Pharmaceutical policies and procedures need to be revised to fit facility.

c. All prescription drugs in facility need to be properly labeled (insulin is an example).

d. Soiled and illegible labels need to be returned to pharmacy for relabeling.

e. Medication cups need to be kept clean and nondrug room items need to be stored in clean and

soiled utility rooms.

f. Emergency drug box needs to be sealed and dated and handled in accordance with K.S.A. 65-1630.

g. Nonsterile disposable supplies need to be removed from drug room and destroyed.

21. K.A.R. 28-39-42 Same; (E) Administration of medications. Drugs need to be properly stored. Each resident's stored separately. Drug room needs to be kept clean and free from items to be stored in utility rooms.

22. K.A.R. 28-39-43 Resident record; (A) Record keeping. Discharge records are not organized.

23. K.A.R. 28-39-43 Same; (D) Staffing. Verification that medical records

designee is a full-time employee is not available.

24. K.A.R. 28-39-44 Infection control and sanitation; (A) Infection control committee. Isolation policies and procedures need to be revised to fit this facility.

25. K.A.R. 28-39-44 Same; (F) Maintenance of equipment and building. Drinking fountain water pressure is not adequate and dripping faucet in resident's room needs repaired.

26. K.A.R. 28-39-44 Same; (B) Aseptic and isolation techniques. Isolation equipment is not available according to procedures to carry out isolation.

The exit interview for the following deficiencies was held on December 11,

1979. These deficiencies pertain to infection control and sanitation. The Secretary finds that the applicant is not in compliance with the additional following state licensure regulations:

27. K.A.R. 28-39-44 Infection control and sanitation; (C) Housekeeping. Laundry; no exhaust fan in soiled linen room.

28. K.A.R. 28-39-44 Same; (F) Maintenance of equipment and building. Dietary Department; the ice machine needed to be repaired or replaced.

29. K.A.R. 28-39-44 Same; (F) Same. Wall joint board in dining room missing.

30. K.A.R. 28-39-44 Same; (F) Same. B-Hall; walls need repairing; shower needs cleaning. Room 26, faucet broken.

The Secretary finds that the applicant should be denied certification for the reason that the facility is not in compliance with the following federal regulations:

1. 42 C.F.R. 442.251 State Licensure. Facility is not currently licensed.
2. 42 C.F.R. 442.302 Staffing. All nurse aides are not qualified by training and copies of certificates are not in personnel files.
3. 42 C.F.R. 442.303 and 42 C.F.R. 442.305 Administration and Policies and Procedures. Policies and procedures need to be revised to fit actual facility in accordance with K.A.R. 28-39-33(K).
4. 42 C.F.R. 442.306 Written Policy and Procedure Admission. Mentally retarded resident is retained in

facility and appropriate program is not provided.

5. 42 C.F.R. 442.314(a) Staff Training Program. Orientation of all new employees, besides nursing personnel, needs to be done and kept on file. Job descriptions need to be revised to fit this facility.

6. 42 C.F.R. 442.314(c) Same. Personnel records need to be kept current as to placement of employees, orientation to other areas when employees change position, and termination and employment dates.

7. 42 C.F.R. 442.315 Health and Safety Laws. Facility does not have letter of approval for change of physical therapy area and utility (clean and soiled) rooms.

8. 42 C.F.R. 442.317 Arrangements with Outside Resources. Occupa-

tional Therapist's contract states she will be in the facility two to three hours each two months--she has provided only one hour every two months.

9. 42 C.F.R. 442.318 Resident Records System. Closed records need to be organized.

10. 42 C.F.R. 442.331(b) Sanitary Conditions. Ice machine needs repaired or replaced. Rinse faucet at dishwasher needs to be repaired or replaced. Steam table needs to keep hot food at 140°F.

11. 42 C.F.R. 442.332(a) Menu Planning and Supervision. Standardized menus need to be used for number of residents in this facility.

Tray identification system needs

to be left on trays to point of return on therapeutic diets to insure diets are taken.

12. 42 C.F.R. 442.333 Pharmacist. Pharmaceutical policies and procedures need to be revised to fit facility and implemented. All prescription drugs in facility need to be properly labeled. Soiled and illegible labels need to be returned to pharmacy for relabeling.

Medication cups need to be kept clean and nondrug items need to be stored in clean and soiled utility rooms. Emergency drug box needs to be sealed and dated and handled in accordance with K.S.A. 66-1630.

Nonsterile disposable supplies need to be removed from drug

room and destroyed.

13. 42 C.F.R. 442.339 Health Service Supervisor. Documentation does not show that Health Service Supervisor is working full time.

14. 42 C.F.R. 442.345(a) Activities Program. A plan for activity needs to be expanded to meet the needs and interests of each resident.

15. 42 C.F.R. 442.345(c) Same. Activity Plan has not been developed into a useful tool for resident care.

The Secretary further finds that the subject licensure application should be denied, in addition to the grounds above stated, because the applicant has repeatedly violated provisions of law or rules and regulations adopted by the Secretary pursuant to Article 9 of Chapter 39 of

the Kansas Statutes Annotated, within the meaning and scope of K.S.A. 1979 Supp. 39-931a. The violations which have been observed in the subject facility are as follows:

	Regulation Violated	Dates of Repeated Violation
1.	K.A.R. 28-39-33 Administration	September 28, 1978 October 13, 1978 May 24, 1979 July 12, 1979 November 13, 1979
2.	K.A.R. 28-39-34 Resident Services	October 13, 1978 July 12, 1979
3.	K.A.R. 28-39-35 Diagnostic and Dental Services	September 28, 1978 October 13, 1978
4.	K.A.R. 28-39-36 Rehabilitative Services	September 28, 1978 October 13, 1978 May 24, 1979

		July 12, 1979
5.	K.A.R. 28-39-37	September 28, 1978
	Social Services	October 13, 1978
		May 24, 1979
		July 12, 1979
		November 13, 1979
6.	K.A.R. 28-39-38	September 28, 1978
	Activities Ser-	October 13, 1978
	vices	May 24, 1979
		July 12, 1979
		November 13, 1979
7.	K.A.R. 28-39-39	May 24, 1979
	Physician Ser-	November 13, 1979
	vices	
8.	K.A.R. 28-39-40	September 28, 1978
	Health Services	May 24, 1979
		July 12, 1979
		October 13, 1979
		November 13, 1979

9.	K.A.R. 28-39-41 Dietetic Services	September 28, 1978 October 13, 1978 May 24, 1979 November 13, 1979
10.	K.A.R. 28-39-42 Pharmaceutical Services	September 28, 1978 October 13, 1978 May 24, 1979 July 12, 1979 November 13, 1979
11.	K.A.R. 28-39-43 Resident Record	October 13, 1978 May 24, 1979 July 12, 1979 November 13, 1979
12.	K.A.R. 28-39-44 Infection Control and Sanitation	September 28, 1978 May 24, 1979 July 12, 1979 November 13, 1979
13.	K.A.R. 28-39-45 Disaster Preparedness	September 25, 1978 September 28, 1978 July 12, 1979

It is therefore by the Secretary ordered that the subject application for licensure and certification for the Broadacres Adult Care Home be denied.

IT IS BY THE SECRETARY SO ORDERED.

Dated this 15th day of January,

/s/ Joseph F. Harkins

Joseph F. Harkins, Secretary
Kansas Department of Health
and Environment

(Omitting Certificate of Mailing)

BEFORE THE KANSAS DEPARTMENT OF

HEALTH AND ENVIRONMENT

In The Matter Of The Licensure
And Certification Of
Broadacres Adult Care Home, Case No. 80-1
Hutchinson, Kansas

ORDER AFFIRMING SECRETARY'S DENIAL
ORDER FOR LICENSURE AND CERTIFICATION

On this 25th day of August, 1980, the Secretary of the Kansas Department of Health and Environment, Joseph F. Harkins, reviews the report of Hearing Officer John R. Martin in the above entitled matter. The Administrative hearing was held on April 16, 1980, May 8, 1980, June 2, 24, 1980, on the appeal from the Secretary's order of denial for licensure and certification which was issued on January 7, 1980.

The Secretary has before him the written findings and recommendation as well as the amended findings of fact and conclusions of law and recommendations that were submitted to him by Hearing Officer John R. Martin as well as the exhibits introduced at the administrative hearing and Mr. Taylor's written comments on the hearing officer's report. The secretary hereby approves the amended findings of fact, conclusions of law and recommendations submitted by the hearing officer, which are attached hereto and made a part of this order. The Secretary adopts the amended findings of fact, conclusions of law and recommendations of the hearing officer as his own. The Secretary finds that the grounds for the subject order of denial were and are correct and therefore, the Secretary finds that

his order of denial should be affirmed and the appeal of Broadacres Adult Care Home of Hutchinson, Kansas, be denied. The Secretary finds that the allegation of bias against Hearing Officer John R. Martin is unsubstantiated and without merit.

It is the Secretary's understanding that Broadacres Adult Care Home is not presently being used as an adult care home and the Secretary is ordering that it shall not be used as an adult care home until it has been licensed pursuant to K.S.A. 39-923, et seq.

Further, the Secretary acknowledges receipt of the "Facility's Written Comments To Hearing Officer's Report". The Secretary has reviewed said comments and given due consideration to them. In determining whether the facility was in substantial compliance with statutes and regulations

for adult care homes is not a numerical determination as to the number of deficiencies, but is a discretionary decision for the Secretary to be made from the seriousness of the deficiencies and the effect the deficiencies have on the overall patient care.

The applicant shall have 15 days after receipt of a copy of this order if she so desires to appeal the Secretary's decision to District Court.

IT IS THEREFORE ORDERED BY THE SECRETARY that his order of denial for licensure and certification dated January 7, 1980, is hereby affirmed and that this facility shall not be used as an adult care facility until after it is properly licensed.

This order entered and made effective this 25th day of August, 1980.

/s/ Joseph F. Harkins

Joseph F. Harkins

BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

In the Matter of the Licensure and Certification of the Broadacres Adult Care Home of Hutchinson, Kansas	)))))	Case No. 80-1

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

This matter is before the Hearing Officer upon an appeal by the Broadacres Adult Care Home of Hutchinson, Kansas, from an Order by the Secretary of the Kansas Department of Health and Environment, dated January 7, 1980, denying its application for a license to operate an intermediate care facility and an application for certification as meeting Medicare regulatory requirements.

A hearing has been held upon the appeal. The facility was represented by Robert Taylor; the Department, by Robert Corbett. In the Order of Denial, the Secretary found that the facility was not in compliance with a number of regulatory requirements.

In deficiency number one, citing K.A.R. 28-39-31(f), the Department alleges that the facility lacked a letter of approval for change of a physical therapy room, a clean utility room and a soiled utility room. Mrs. Hanson, who surveyed the facility, testified that these facilities were located in an unlicensed portion of the building which was formerly occupied by an apartment provided for the administrator. She further testified that if approval had been requested, it might well have been denied on the ground that it was too distant from residents' quarters,

and lacked proper equipment. The testimony was undisputed that these changes had not been approved by the licensing agency, and it is my recommendation that this deficiency constitutes substantial noncompliance with the cited regulation.

The second alleged deficiency, cited under K.A.R. 28-39-33(A) alleges that the policies and procedures are available, but do not always fit this particular facility and cannot be used as written. The referenced regulation requires that the facility adopt and enforce acceptable policies and procedures. Mrs. Hanson cited a number of instances in which either policies or procedures were inadequate. She cited a conflicting policy on self-medication, one portion of which prohibited and another portion of which permitted it. One policy called for double water soluble bags to be available from

central supply for isolation of linents. The policy was inappropriate, she testified, because it was one adapted for a large hospital, and in addition, was not being carried out because no such bags were available. Certain policies were unacceptably vague, referring, e.g., to an "appropriate" solution without giving guidance as to what solutions were to be used. She testified that there were no policies and procedures for activity programs. The housekeeping policy provided, in one instance, that nurses' aides on the eleven-to-seven shift would clean bathrooms - a policy which constituted a serious breach of infection control. She testified that pharmaceutical policies needed to be revised to fit the facility, and to be implemented. That policy provided, in part, for a unit dosage plan, which was not in use at the

facility. The resident care policy was inconsistent, she stated, providing on the one hand that the administrator was responsible, and elsewhere that the resident care director was responsible therefor. The testimony of the Department fully supports the finding of a substantial violation of the referenced regulation in regard to deficiency number two.

Regarding deficiency number three, it is alleged that some job descriptions needed to be revised to fit the facility, with specific reference to the Director of Nurses, Resident Care Coordinator, and Resident Health Services Director. The nature of the needed clarification is not clear from the record, and I cannot find substantial noncompliance on this point.

In deficiency number four, citing K.A.R. 28-39-33(D), the Department alleges

that the orientation for all new employees, besides nursing personnel, needed to be provided, and records thereof, to be kept on file. Mrs. Hanson cited eight employees whose files lacked any record of orientation in the departments to which they were assigned. The record supports a finding of substantial noncompliance on this deficiency.

The fifth deficiency likewise relates to K.S.A. 38-39-33(D), citing the failure of the facility to keep personnel records current as to the placement of employees, orientation to other areas when they change positions, termination and employment dates. The Department cites instances involving eight employees whose personnel records were not kept current. The testimony, in my judgment, supports a finding of substantial noncompliance on this score.

In deficiency number six, the Secretary cited K.A.R. 28-39-33(F), subsection (2), of which provides that a nursing home shall admit only those residents whose nursing care and physical needs can be provided by the staff and facility. Mrs. Hanson testified that a mentally retarded resident was retained in the facility, and that an appropriate program was not provided. The facility introduced Exhibits 4, 5 and 6, including a psychological and psychiatric evaluation which indicated that the resident was provided appropriate care in the facility. In my judgment, the evidence on this point does not support a finding that an appropriate program was not provided for this resident.

In deficiency number seven, the facility is cited for failure to have resident care policies which were reviewed

and revised by the professional advisory board to fit this facility, and for failure to have a qualified person responsible for the administration of such policies. The referenced regulation, K.A.R. 28-39-33(K), requires that the facility appoint in writing, a physician, registered nurse or medical staff to be responsible, whereas, in fact, the administrator, who lacked these qualifications, was identified as the responsible party. The evidence supports a finding of substantial noncompliance on this point.

In deficiency number eight, the facility is cited for window curtains which did not provide adequate privacy to the residents. Mrs. Hanson testified that certain windows had very sheer curtains, and no blinds, such that, at night, residents would not be afforded adequate privacy from the outside. She testified

that in rooms 42 and 43, there were no curtains at all. The facility denied having a room 43. Marshall Stauffer, for the facility, testified that all rooms, but number 27, had curtains, and it was being used as a storage room. He testified that blinds were installed in all occupied rooms, except rooms one and four. The facility introduced a number of curtain fabrics as exhibits, as to some of which Mrs. Hanson testified that they were not hanging in the facility on the date of the survey. Appellants' Exhibits 26, 27, 28 and 29 were offered as representative of the curtains hanging in the facility at the time. Appellant's Exhibits 25 and 30 were offered as representative of 30 of the rooms, and 26 through 29 as representative of four of them. Mrs. Hanson testified that she did not see all of the

exhibit curtains hanging, that some of those which were hanging were cotton and sheers, and were excessively sheer. Viewing the testimony as a whole, the exhibit curtains do not conclusively dispute the testimony and judgment of the surveyor, that those in place at the time of the survey were excessively sheer. However, she also testified that the curtains she saw were unacceptable unless blinds were installed in the rooms, and Marshall Stauffer testified that blinds were installed in all the rooms which were occupied. Viewing the evidence and testimony as a whole, I cannot find a substantial violation on this score.

In deficiency number nine, citing K.A.R. 28-39-36, the Secretary found that the occupational therapist was retained under a contract which called for her

presence at the facility for two to three hours each two months, but that she provided services only for one hour every two months. The referenced regulation, subsection (B), requires that the "facility shall maintain a rehabilitative program, either directly or through arrangements with qualified outside resources." While the consulting therapist apparently performed fewer hours of service than called for by her contract, it is not clear that the services which were provided were, in fact, adequate to meet the needs of the residents. Thus, I cannot find a substantial violation on this question.

The facility is cited under K.A.R. 28- 9-38(A) for failure to maintain an activity plan and program which meet the needs and interests of the residents. Mrs. Hanson testified that at the time of the survey, there were 16 residents

and one full-time activity director. She testified, on direct examination, that there were no activities scheduled for the days she was there, and that there were no activity plans for any of the sixteen residents. She stated that the only activity available was watching television, that the color was in extremely poor adjustment and caused discomfort to several residents.

The facility introduced a number of activity care plans prepared by Carol Stahl. activity director. Mrs.[sic]Stauffer testified that they had been prepared prior to the survey, and that he had assisted Ms. Stahl in their preparation. Mrs. Hanson testified that she had extensive conversations with Ms. Stahl about activity plans at the time of the survey, who told her that she had not developed activity plans for many residents. She

testified that on the survey dates, there was some crafts, some exercise, and television watching. She stated that residents complained of having too little to do. Regarding Appellant's Exhibit 7, which she could not recall affirmatively having seen during the survey, she stated that they were not being carried out.

The testimony of the witnesses for the Department supports the finding that the activity program and plans of care on the date of the survey were not sufficient to meet the needs and interests of the residents. Mrs. Hanson testified that during the exit interview, she advised the staff that what they had was "good," but that there were not enough activities. In my judgment, the evidence supports a finding of substantial noncompliance in the provision and furnishing of an adequate activity program and plan of care.

In deficiency number fifteen, the facility is cited for a violation of K.A.R. 28-39-41(B), that tray identification cards were removed from trays at the steam table. This is a violation of subsection (E)(19), rather than subsection (B). However, the facts of the violation were not substantially disputed, and the record supports a finding of substantial noncompliance on this deficiency.

In deficiency number sixteen, the Department alleges that food supplies were not always on hand to serve diets as ordered, that equal substitutes of caloric and nutritional content were not furnished. One meal was observed during the survey, on November 13, 1979. At that meal, pickled carrots were substituted for cole slaw because there was no cabbage on hand to prepare cole slaw. This substitution was not of equal nutritive value. Also, blue

plums were listed on the menu but because of an inadequate supply, peaches were substituted.

The question may be raised whether this demonstrates substantial noncompliance, with the referenced regulation, K.A.R. 28-39-41(B)(4). Monitoring of compliance is necessarily based upon random surveys, which seek to determine the operation of the facility on a random, but representative fashion. Here, in one meal, food supplies were inadequate to serve two separate dishes. In my estimation, this demonstrates substantial noncompliance with the referenced regulation.

In deficiency number seventeen, the facility is cited for failure to use standardized recipes appropriate for the number of residents. K.A.R. 28-39-41(B) is cited, whereas subsection (D)(1) imposes this requirement. Mrs. Hanson

testified that too much food was being prepared due to failure to use standardized recipes, resulting in excessive leftover food, some of which was served as leftovers. The testimony on this point was substantially undisputed, and the record supports a finding of substantial noncompliance on this point.

In deficiency number eighteen, the facility is cited for violating K.A.R. 28-39-41(D), due to an inoperative ice machine, a defective rinse faucet at the dishwashing facility, and a defective toaster. The toaster was repaired by November 21, 1979. Subsection (D)(9) requires that "ice shall be available for meal and room service." Testimony that the ice machine was inoperative was substantially undisputed. Mrs. Hanson expressed concern that transporting ice into the facility posed a risk of contami-

nation, and construed the regulation to require that ice be furnished from equipment in the facility. The regulation requires that ice be available for meal and room service, but not expressly that ice-making facilities be provided. There is no evidence that ice was not available as the regulation requires. I can find no substantial noncompliance on this point.

In deficiency number nineteen, the facility was cited for failure to maintain hot food in the steam table at 140 degrees F. Although the facility introduced evidence questioning whether the temperature measurement was accurate, the facility failed to discredit the method used by the surveyor in measuring the temperature of the food on the hot table at the time of the survey. The record supports a finding of substantial noncompliance on this point.

Regarding deficiency number twenty, Mrs. Hanson testified that the pharmaceutical policies and procedures were designed for a unit dose system, which was not being used by the facility. She testified that glass medicine cups were stored, unwashed, in a cabinet, that some medicine was improperly labeled, and lacked prescription numbers or directions for use. She also testified that some labels were soiled and illegible; that non-drug items were stored in the pharmacy room, and that the stop order did not specify narcotic stoppage. The facility offered evidence that no narcotics were being used in the facility at the time. The record abundantly supports a finding of substantial noncompliance on this point, for the Department's testimony regarding these deficiencies was largely and substantially undisputed. Likewise, the testimony supports a finding

of substantial noncompliance regarding deficiency number twenty-one, for it indicated that residents' medications were not stored separately, and that nondrug materials were stored in the drug room.

Regarding deficiency number twenty, Mrs. Hanson testified that she requested the resident records for all those residents who died or were discharged during the preceeding year, and that she found them in a disorganized and jumbled condition, in violation of K.A.R. 28-39-43(A), which requires maintenance of an organized record system in accordance with accepted professional standards and practices. The facility offered certain records to dispute this allegation, but Mrs. Hanson testified that when she inspected them at the date of the survey, they were not in the filed and bound condition in which

they were offered at the hearing. The record supports a finding of substantial noncompliance on this score.

Likewise, the record supports a finding of substantial noncompliance regarding deficiency number twenty-three, which requires that the medical records designee be a full-time employee. The testimony indicated that Trudy Stauffer was identified as the medical records designee, and that she was not a full-time employee of the facility.

Regarding deficiency number twenty-four, the facility is cited under K.A.R. 28-39-44(A) for isolation policies and procedures which were in need of revision to fit this facility. Mrs. Hanson stated that three or four policies had been borrowed from other facilities, had been combined in an awkward fashion, and that

they were in need of clarification to assure that there was a single, clear policy. The policy regarding cultures was incomplete, regarding flu was not workable, and there were no adequate instructions regarding cleaning materials, she testified. The regulation requires that written policies and procedures for investigating, controlling and preventing infection in the facility be adopted, and necessarily, that they be adequate and effective. The facility offered Exhibit 15, as infection control policies and procedures. The deficiencies cited by Mrs. Hanson were not substantially rebutted by the facility, and the record supports a finding of substantial noncompliance on this score.

In deficiency number twenty-five, the facility is cited under K.A.R. 29-

39-44(F) for maintaining inadequate water pressure in a water fountain, and a dripping faucet in one resident's room. The existence of these deficiencies are not substantially disputed. However, it is not clear that these are other than routine and incidental conditions of disrepair. The record does not support a finding of substantial noncompliance on this point.

Deficiencies numbered twenty-seven through thirty pertain to sanitation and infection control deficiencies. The facility was cited for having no exhaust fan in the soiled laundry room, under K.A.R. 28-39-44(C), and for the defective ice machine, a missing well joint board in the dining room, and an uncleaned shower, hole in a wall, and broken faucet in one resident's room, all under sub-

section (F). The existence of a defective ice machine was undisputed, and supports a finding of substantial failure to maintain mechanical equipment in good repair and operating condition. The testimony indicated that the shower which needed cleaning showed signs of neglect and inattention, resulting from more than occasional oversight or inadvertence. In my judgment, the record supports a finding of substantial noncompliance with regard to deficiencies numbered twenty-eight and thirty. The deficiencies in number twenty-seven and twenty-nine, while undisputed, do not appear to be substantial in nature.

The Secretary also found noncompliance in certain respects of a number of cited federal regulations, sufficient to support denial of certification. In large measure, the cited violations

parallel those discussed above. Accordingly, it is unnecessary to recite again the evidentiary presentations respecting those violations. The record supports a finding of substantial noncompliance respecting deficiencies numbered one, two, three, five, six, seven, nine, ten, eleven, twelve, thirteen, fourteen and fifteen.

In addition, the evidence offered by the Department supports the findings of the Secretary respecting repeated violations of law or rules and regulations adopted by the Secretary respecting the operation of intermediate care facilities.

Accordingly, and on the basis of the foregoing, it is my recommendation to the Secretary that the Order of January 8, 1980 denying the application for licensure

and for certification for the Broadacres Adult Care Home of Hutchinson, Kansas be affirmed.

July 17, 1980 /s/ John R. Martin

Date John R. Martin

Hearing Officer

(Omitting Certificate of Service)

BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

In The Matter Of The Licensure and Certification of the Reno County Adult Care Home Facility of Hutchinson, Kansas

Case No. 80-2

ORDER DENYING APPEAL

On this 9th day of May, 1980, the Secretary of the Kansas Department of Health and Environment, Joseph F. Harkins, receives the written report of Hearing Officer Arthur E. Palmer in this matter. Hearing Officer Palmer held hearings on March 10, 11, 12, 19 and 26, 1980, on the appeal from the Secretary's Order of Denial which was issued on January 15, 1980.

The Secretary has before him the

written report of Hearing Officer Palmer as well as a transcript of the proceeding, including exhibits. The Secretary hereby approves the hearing officer's report, attaches it to this Order as Exhibit A and incorporates it herein. The Secretary adopts the findings and conclusions of the hearing officer as his own. The Secretary finds that the grounds for the subject Order of Denial were and are correct except as modified by the hearing officer's report and therefore, the Secretary finds that his Order of Denial should be affirmed and the appeal of the Reno County Adult Care Facility be denied.

The Reno County Adult Care Facility shall be given fifteen (15) days after this decision is mailed to comply with the Secretary's Order as provided in K.S.A. 1979 Supp. 39-931.

The applicant shall have fifteen (15) days after receipt of a copy of this Order to appeal the Secretary's decision to District Court.

IT IS THEREFORE ORDERED BY THE SECRETARY that the appeal of the Reno County Adult Care Facility be, and the same is, hereby denied.

This Order entered and made effective this 19th day of May, 1980.

/s/ Joseph F. Harkins

Joseph F. Harkins, Secretary

(Omitting Certificate of Mailing)

BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

In the Matter of the Licensure and Certification of the Reno County Adult Care Home Facility of Hutchinson, Kansas.

Case No. 80-2

HEARING OFFICER'S REPORT TO THE SECRETARY

Preliminary Statement

Following a field survey concluded November 15, 1979, the Secretary entered his order on January 15, 1980, denying a license and certification as an intermediate care adult home to the Reno County Adult Care Home Facility of Hutchinson, Kansas (hereafter the "Facility"). A timely notice of appeal was filed by the Facility pursuant to K.S.A. 39-931,

specifying that the Secretary's Order was arbitrary and capricious, illegal or unjust because:

(1) The minimal level of care for residents required by statute is provided at the Facility;

(2) The violations of regulations cited by the Secretary do not affect the level of care provided residents;

(3) It was unreasonable to deny the Facility a license for violation of regulations when other facilities similarly situated are licensed;

(4) The Secretary applies the Rules and Regulations pertaining to adult care homes in an arbitrary manner and arbitrarily applies the statutory standard

of substantial compliance (K.S.A. Supp. 39-931) in licensing decisions;

(5) The facts do not support the deficiencies cited;

(6) The repeated violations of the regulations cited in the Secretary's Order of January 15, 1980, are not repeat violations within the meaning of K.S.A. 39-931a(b)(1).

(See, Transcript, Vol. I, pp. 13-19 and the Notice of Appeal.)

The Secretary appointed a hearing officer on January 31, 1980, and scheduled the appeal for February 11, 1980. On motion of the Facility, that hearing was continued by the Secretary, and at the Facility's request, another hearing officer was appointed on March 4, 1980. At

that time the hearing was rescheduled to March 10, 1980.

Evidence was heard on this appeal on March 10, 11, 12, 19 and 26, 1980, resulting in approximately 747 pages of transcript and the receipt of 23 exhibits and four files of the Department concerning other facilities. The parties waived oral argument. The Facility has submitted a brief and suggested findings of fact and conclusions of law within the time therefor allowed by the Hearing Officer. The Department waived submission of a brief and suggested findings of fact and conclusions of law.

The Hearing Officer reviewed the files of other care homes as requested by the Facility at the Department on April 30, 1980, but notes that part of the file for the Lyndon Care Home was not available for re-

view. Having considered the evidence and the briefs of the Facility, the Hearing Officer recommends to the Secretary the following:

Findings of Fact

1. The Facility is in violation of K.A.R. 28-39-33, 28-39-34, 28-39-36, and 28-39-38, for the reasons stated by the Secretary in paragraphs numbered 1 through 8 on pages 1 and 2 of his January 15, 1980, Order.

2. The evidence does not support the alleged violation of K.A.R. 28-39-33 (paragraph 9, page 2, of January 15, 1980, Order) since the circumstances of the particular admission did not practically admit of further preparation for the patient's (Rosa Baar) admission.

3. The Facility is in violation of K.A.R. 28-39-40 for not having documenta-

tion of a nurse aide certification on file for each employee. The Hearing Officer credits the testimony of Mrs. Hanson that no certificate was available for Wilimina Garwood. (Tr. Vol. II, p. 112; Vol. III, p. 195).

4. The Facility is in violation of K.A.R. 28-39-41(D)(8) and (19) in that eggs were not served at 140 degrees Fahrenheit, and the tray identification system was inadequate. The failure to have muffin tins does not result in a violation of any regulation.

5. The Facility is in violation of K.A.R. 28-39-42 for the reasons stated in paragraphs 12 and 13 on pages 2-3 of the Secretary's January 15, 1980, Order.

6. The Facility is in violation of K.A.R. 28-39-43 for the reasons stated in paragraphs 14, 15 and 16 on page 3 of the

Secretary's January 15, 1980, Order.

7. Although an effort was made by the Facility after the November 15, 1979, survey to get in more fire drills, at the time of the survey the Facility's Exhibit E itself reveals the Facility was in violation of K.A.R. 28-39-45.

8. The Facility is in violation of K.A.R. 28-39-41 and 28-39-44 for the reasons stated in paragraphs numbered 1 and 2 on page 3 of the Secretary's January 15, 1980, Order.

9. The laundry facility is constructed so that it results in a violation of K.A.R. 28-39-46(L)(d). This condition was pointed out to the architect who designed the Facility by letter from the Department on September 8, 1970, but is not mentioned in any other survey in the record until the November 15, 1979, survey.

10. The Facility is in violation of K.A.R. 28-39-48(K)(2) because there was no sign on the toilets for the handicapped.

11. The violations found in the proposed findings of fact numbered 1 through 10, and the evidence introduced, support a finding, and I so find, that the Facility was in violation of the cited federal regulations in paragraphs 2 through 19 on pages 4-6 of the Secretary's Order of January 15, 1980, except that I do not find that the failure to have muffin tins violates 42 C.F.R. 442.332.

12. (a) On pages 6 and 7 of the Secretary's Order of January 15, 1980, is a compilation which recites that on surveys from August 30, 1976, through the November 15, 1979, survey, certain regulations have been cited as violated on more than one occasion. The regulations cited

usually contain many detailed subprovisions. With a few exceptions in the area of writing and maintaining adequate policies and procedures, the particular violations of the regulations are not based on the same or similar factual circumstances and I have wholly discounted those areas where no violation was found in the November 15, 1979, survey, i.e., paragraphs numbered 3 and 8 on pages 6-7 of the Secretary's January 15, 1980, Order.

(b) Although not precluded from doing so, the Facility offered no evidence that the previous deficiencies cited in prior surveys were incorrect. I therefore find that the violations cited did occur except for the violations cited in the March 1, 1979, survey. As to that survey, the only violations considered are those found to exist on appeal listed in the Hearing

Officer's report of October 24, 1979, in Findings of Fact numbered 3 through 6.

(c) I find the following regulations to have been repeatedly violated by the Facility:

(i) K.A.R. 28-39-33(A)(1)

(ii) K.A.R. 28-39-33(A)(3)

(iii) K.A.R. 28-39-38(A)(1)

(iv) K.A.R. 28-39-41(D)(8)

(v) K.A.R. 28-39-45(B)

13. Residents at the Facility are not in immediate danger to life or health, but inadequate management programs clearly indicate that the Facility is not prepared to meet emergencies or untoward developments should they arise (e.g., Tr. Vol. II, pp. 53-55).

14. Since during the time of the survey no emergencies developed, the evidence does not show actual harm to residents from

the violations found.

15. A review of the files of the Secretary as requested by the Facility and a review of the Facility's Exhibit I do not indicate disparate treatment of the various facilities since in each the nature of the deficiencies cited varies and in each the plan of corrections offered was different, and in one case the plan even appears to include building a new facility to correct structural defects.

Conclusions of Law

1. Except for paragraph 9; the last sentence of 11, on page 2 of the January 15, 1980, Order; 1 on page 4 of the Order; and the last sentence of 13 on page 5 of the Order, the findings of fact made by the Secretary are supported by the evidence.

2. The lapse of nearly ten years in remedying the deficiency on the laundry

construction (paragraph 3, page 3, of the Order) makes reliance upon that deficiency for any purpose other than to require its correction unjust. Warburton v. Warkentin, 185 Kan. 468, 345 P.2d 992, Syl. 7. Of course, the delay in citing this deficiency does not prevent the Secretary from enforcing compliance. See, e.g., 73 C.J.S., Public Administrative Bodies, §261.

3. Although repeated violation of regulations exist, at least to the extent I have indicated in Finding of Fact 12 above, I do not recommend that the Secretary in his discretion invoke K.S.A. 1979 Supp., 39-931a. That statute is intended for situations where a facility by the same or similar facts has often violated a particular regulatory prohibition. The fact that since the regulations contain many individual prohibitions and thus a

particular numbered regulation may be violated by several wholly different facts militates against use of the statute except in cases where the facility refuses to correct a specified deficiency. There is no such refusal here, only an inability for some reason to meet the requirements for administration. I have considered, however, and do recommend that the Secretary consider, the fact that this facility has been unable to comply with the regulations on administration after repeated deficiencies in the general area. "The revocation of a license for repeated violations of a statute is not improper merely because the revoking authority has failed to revoke the licenses of other licensees for single violations."
53 C.J.S., Licenses, §44, p. 652.

4. The statutory standard for li-

censing is that a license is to be granted unless the Secretary finds "a substantial failure to comply with the requirements." The inverse of substantial failure to comply would seem to be "substantial compliance," which requires compliance in respect to essential matters necessary to assure every reasonable objective of the statute. City of Kansas City v. Board of County Commissioners, 213 Kan. 777, 785, 518 P.2d 403 (1974). The purposes of the licensing statutes for adult care homes are set out in K.S.A. 1979 Supp. 39-924. Basically, they are to promote safe and adequate accomodations, care and treatment of residents. Some of the deficiencies found at the Facility could never support a denial of licensure standing on their own. Examples are the required signs on handicapped toilets used by visitors,

the failure to have the right piece of paper showing one employee's licensure, and having the administrator's home telephone number in the disaster plan. However, the deficiencies taken as a whole do show a substantial failure on the part of the Facility's administration to comply with the regulations requiring policies and procedures to prepare the staff for untoward events such as disasters or infections, or for the care and activities of residents.

5. This facility has had over one year to obtain the type of administration needed to substantially comply with the requirements for licensure and its failure cannot be forever countenanced. While perfection in compliance with the requirements would appear to be a feat not likely to be obtained by any facility, the

Secretary must insist on a better compliance than shown here when an operator has been denied licensure (See May 3, 1979, Order, affirmed October 24, 1979) and reapplies.

6. The licensing statutes grant the Secretary discretion in determining qualifications for a license as indicated by the "substantial failure to comply" test of K.S.A. 1979 Supp., 39-931. "The power to exercise an honest discretion includes the power to make an honest mistake of judgment and the power of administrative bodies to decide questions is not confined to deciding them correctly." 73 C.J.S., Public Administrative Bodies, §61. There is no evidence in this record of arbitrary or capricious treatment of facilities by the Secretary, and accepting, arguendo, the Facility's factual claims, its argu-

ment would reduce to a claim that the Secretary has mistakenly granted a license to other facilities who do not substantially comply with the licensing requirements and should here repeat that error. As indicated above, I do not find that the Secretary has in fact so acted and do not accept the legal argument following even if such facts were proved. Compare, Coggins v. Public Employee Relations Board, 2 Kan.App.2d 416, 581 P.2d 817 (Syl. 3), and Warburton v. Warkentin, 185 Kan. 468, 477, 345 P.2d 992, where the Court states:

> "Certainly an administrative agency, charged with the protection of the public interest, is not precluded from taking appropriate action to that end because of mistaken action on its part in the past."

Recommendation

The Hearing Officer recommends that:

1. The Secretary's Order of January 15, 1980, be affirmed as modified.

2. The application of the Reno County Adult Care Facility for licensure and certification be denied.

Dated at Topeka, Kansas, this 7th day of May, 1980.

/s/Arthur E. Palmer

Arthur E. Palmer,

Hearing Officer

BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

In The Matter Of The Licensure And Certification Of The Reno County Adult Care Facility Of Hutchinson, Kansas

80-2

DENIAL ORDER FOR LICENSURE AND CERTIFICATION

Now on this 15th day of January, 1980, the Secretary of the Kansas Department of Health and Environment, Joseph F. Harkins, considers the application filed on October 24, 1979 by the operators of the subject facility for a license to operate an intermediate care adult care home and also their application for certification as meeting Medicaid Regulatory Requirements filed November 1, 1979.

The Secretary finds, upon further examination of his files, that the facility was inspected, or surveyed, on November 15, 1979, for the purposes of licensure and certification; the results of that inspection were provided to the administrator of the facility during a so-called "exit interview" on November 21, 1979. A report of that inspection has been submitted to the Secretary's office and is before the Secretary.

The Secretary finds that the application for licensure of the Reno County Adult Care Facility should be denied for the reason that the facility is in substantial failure to comply with the requirements, standards and regulations promulgated by the Secretary. The Secretary finds that the applicant is not in substantial compliance with the following state licensure regulations:

1. K.A.R. 28-39-33 Administration. (A) Management. Policies and procedures need to be revised to fit this facility and procedures are needed to govern all areas and function.
2. K.A.R. 28-39-33 Same. (A) Management. Administrator needs to maintain communication with nursing staff and other departments in regard to new admission so person is on duty to process admission material when new residents are admitted.
3. K.A.R. 28-39-33 Same. (J) Resident rights. Policies states that resident can be discharged for complaining in the facility.
4. K.A.R. 28-39-33 Same. (K) Development and review of resident

care policies. Committee has reviewed, but has not revised policies to fit this facility.

5. K.A.R. 28-39-34 Resident services. (B) Resident care plan. Total care plan is not a useful tool in management of care. All goals need to be measureable.

6. K.A.R. 28-39-36 Rehabilitative services. (A) Plan of care. No rehabilitation plan of care available.

7. K.A.R. 28-39-38 Activities services. (A) Programming. The activity program needs to be expanded to meet the needs of independent and group activities for each resident.

8. K.A.R. 28-39-38 Same. (C) Recreation areas. Recreation equipment

appropriate for residents needs to be obtained.

9. K.A.R. 28-39-39 Physician services. (B) Medical findings and physician's orders at time of admission. Medical information for new residents needs to be processed immediately upon admission so that care may be given as ordered.

10. K.A.R. 28-39-40 Health services. (D) Nursing home aide qualifications. Documentation of nurse aide certification is not kept on file for each employee.

11. K.A.R. 28-39-41 Dietetic services. (D) Preparation and service. Hot food (eggs) served at 112 degrees F. Tray identification system is not legible and is not left on special diet trays to identify

food consumed. Muffin tins need to be purchased so that menus can be followed.

12. K.A.R. 28-39-42 Pharmaceutical services. (B) Physician orders. All legend drugs need to be under prescription.

13. K.A.R. 28-39-42 Same. (E) Administration of medications. Drug room needs to be kept free of all personal care items and items that need to be stored in clean and soiled utility room.
Emergency kit needs to be sealed and dated.
Policies and procedures for emergency drugs need to be followed.
Policies on self administration of drugs needs to be clarified.

14. K.A.R. 28-39-43 Resident record.

(A) Record keeping. Close records need to be organized according to policies and procedures.

15. K.A.R. 28-39-43 Same. (B) Content. Two of records checked lacked past medical history.

16. K.A.R. 28-39-43 Same. (D) Staffing. No full-time employee responsible for medical records.

17. K.A.R. 28-39-45 Disaster preparedness. (B) Fire drills. Fire drills are not held four times a year on 11-7 shift and 3-11 shift is combined with day shift.

The exit interview for the following deficiencies was held on December 11, 1979. These deficiencies pertain to infection control and sanitation. The Secretary finds that the applicant is not in compliance with the additional following state licensure regulations:

1. K.A.R. 28-39-41 Same. (F) Sanitation. Final rinse temp on dishwashing machine is 160 degrees. Must be 170 degrees F.
2. K.A.R. 28-39-44 Infection control and sanitation. (A) Infection control committee. Policies and procedures for investigating, controlling and prevention of infections are not appropriate for this facility.
3. K.A.R. 28-39-44 Same. (C) Housekeeping. Must provide functional separation in laundry.
4. K.A.R. 28-39-31 Licensing procedure. (B) Renewal of license and K.A.R. 28-39-48 Construction requirements. (I) Codes and standards. Need sign on handicapped toilets.

The Secretary finds that the applicant should be denied certification for the reason that the facility is not in compliance with the following federal regulations:

1. 42 C.F.R. 442.251 State Licensure. Facility has not been licensed since 3/24/79.
2. 42 C.F.R. 442.302 Staffing. Certificate for one nurse aide is not on file.
3. 42 C.F.R. 442.303 (b) Administrator. Communication with staff members and administration needs to be improved to implement policies and procedures and provide general direction.
4. 42 C.F.R. 442.303 (b) and 442.305 Written Policies and Procedures and Administrator. Policies and procedures need to be

revised to fit this facility and be in compliance with State and Federal regulations.

5. 42 C.F.R. 442.305 (a) Written Policies and Procedures and Administrator. Policies and procedures are not available to govern all areas of service.

6. 42 C.F.R. 442.307 (b) Written Policies and Procedures - Transfer and Discharge. Five-day clause for notice for dismissal is not included in discharge policy.

7. 42 C.F.R. 442.308 Written Policies and Procedures and Physical and Chemical Restraints. Physical and chemical restraint policy and procedure did not define the use of restraints and did not identify

the professional who may authorize the application of restraints in emergencies. Mechanism for monitoring and controlling had not been developed.

8. 42 C.F.R. 442.309 Written Policies and Procedures. Resident policy on complaints stated that "Upon habitual and repeated complaint from the resident and/or family the transfer and discharge policy will be utilized and the resident will be required to move elsewhere."

9. 42 C.F.R. 442.313 Emergencies. Only three fire drills have been held during past year on the 11-7 shift. 3-11 shift drills need to be held separately from 7-3 shift. Disaster plans need to be

updated including administrator's current telephone number.

10. 42 C.F.R. 442.318 (c) (2) Resident Record. Two of records reviewed lacked past medical histories.

11. 42 C.F.R. 442.318 (c) (3) Resident Record System. The overall plan of care is not developed as a useful tool in management of care. Goals were not measurable.

12. 42 C.F.R. 442.318 (c)(4) Resident Record System. Follow-up notes on PRN orders are not always being done.

13. 42 C.F.R. 442.332 Menu Planning and Supervision. Eggs were served at 112 degrees F. Tray identification system needs to be legible and left on tray to point of return to identify food consumed on

therapeutic diets. Muffin tins need to be purchased to serve menus as written.

14. 42 C.F.R. 442-333 (b) Licensed Pharmacist. Policies and procedures for control of emergency drugs needs to be followed. All legend drugs need to be under prescription. Emergency kit needs to be sealed and dated. Drug room needs to be kept free of all personal care items that should be stored in clean and soiled utility rooms.

15. 42 C.F.R. 442.336 (a) Medication Review. All medication reviews need to be dated.

16. 42 C.F.R. 442.337 (b) Administration of Medications. Facility has conflicting policies con-

cerning self administration of medications.

17. 42 C.F.R. 442.343 (e) Rehabilitative Services. Facility did not have any rehabilitation plans of care developed for any residents. Staff member was unaware of responsibility for this.

18. 42 C.F.R.442.345 (c) Activities Program. Activity plan for independent and group activities is not developed to meet the needs and interests of each resident. Relief is not provided for Activity Director when she is absent, so program is not being carried out.

19. 42 C.F.R 442.345 (d) Activities Program. Equipment and materials are not available to carry out an

activity program appropriate for residents.

The Secretary further finds that the subject licensure application should be denied, in addition to the grounds above stated, because the applicant has repeatedly violated provisions of law or rules and regulations adopted by the Secretary pursuant to Article 9 of Chapter 39 of the Kansas Statutes Annotated, within the meaning and scope of K.S.A. 1979 Supp. 39-931a. The violations which have been observed in the subject facility are as follows:

No.	Regulation Violated	Dates of Repeated Violation
1.	KAR 28-39-33 Administration	August 30, 1976 May 17, 1977 May 4, 1978 July 10, 1978 March 19, 1979

		November 15, 1979
2.	KAR 28-39-34	March 19, 1979
	Resident services	November 15, 1979
3.	KAR 28-39-35	July 10, 1978
	Diagnostic &	March 19, 1979
	dental services	
4.	KAR 28-39-36	March 19, 1979
	Rehabilitative	November 11, 1979
	services	
5.	KAR 28-39-38	August 30, 1976
	Activities services	May 4, 1979
		May 17, 1979
		March 19, 1979
		November 15, 1979
6.	KAR 28-39-39	July 10, 1978
	Physician services	March 19, 1979
		November 15, 1979
7.	KAR 28-39-40	May 17, 1977
	Health services	July 10, 1978
		March 19, 1979
		November 15, 1979

8.	KAR 28-39-41	July 10, 1978
	Dietetic services	March 19, 1979
9.	KAR 28-39-42	August 30, 1976
	Pharmaceutical	May 17, 1977
	services	March 19, 1979
		November 15, 1979
10.	KAR 28-39-43	August 30, 1976
	Resident records	May 17, 1977
		July 10, 1978
		March 19, 1979
		November 15, 1979
11.	KAR 28-39-44	March 19, 1979
	Infection control	November 15, 1979
	and sanitation	
12.	KAR 28-39-45	July 10, 1978
	Disaster	March 10, 1979
	Preparedness	

It is therefore by the Secretary ordered that the subject application for licensure and certificate for the Reno County Adult Care Facility be denied.

IT IS BY THE SECRETARY SO ORDERED.

Dated this 15th day of January, 1980.

/s/ Joseph F. Harkins

Joseph F. Harkins, Secretary

(Omitting Certificate of Mailing)

K.A.R. 28-39-33 (1978)

28-39-33. Administration. (A) Management. The licensee or designated person so functioning shall have full legal authority and responsibility for the operation of the intermediate care home and compliance with licensing requirements.

(1) The licensee, through the administrator, shall adopt and enforce acceptable policies and procedures relative to:

(a) The health care, safety, social, psychological, and self-esteem needs of the resident.

(b) Protection of personal and property rights of the residents.

(c) The general operation of the facility.

(2) The licensee shall provide ownership information as follows:

(a) The identity of each person who

has any direct or indirect ownership interest of 10 percent or more in the facility or who is the owner (in whole or in part) of any mortgage, deed of trust, note, or other obligation secured (in whole or in part) by such facility or any of the property or assets of such facility.

(b) In case a facility is organized as a corporation, of each officer and director of the corporation.

(c) In case a facility is organized as a partnership, of each partner.

(d) Prompt reports of any changes which would affect the current accuracy of the information required.

(3) The licensee shall adopt effective administrative and resident care policies and procedures governing the operation of the facility. They shall be

reviewed and revised in writing as necessary and shall be posted and available on request to all personnel concerned and to the general public.

(4) The licensee shall appoint a full-time licensed administrator who is responsible for the overall management of the facility including:

(a) Enforcing the policies and procedures relative to the level of health care and safety of residents and to the protection of their personal and property rights.

(b) Planning, organizing, and directing those responsibilities delegated to him by the licensee.

(c) Maintaining, through meetings and periodic reports, ongoing liaison with the licensee, medical and nursing staff, and other professional and supervisory staff.

(d) Studying and acting upon recommen-

dations made by the advisory committee and other committees.

(e) Authorizing, in writing, a responsible employee 18 years old or over to act on his behalf in his absence.

(B) Advisory committee. (1) The facility shall have an advisory committee consisting of a physician, a nurse, a religious advisor, and other local citizens who will give advice and counsel to the administrator on matters of resident and community interest.

(2) The committee shall meet as often as necessary but not less than once every six months. Minutes of each meeting shall be kept on file in the facility.

(C) Personnel policies and procedures. (1) The licensee, through the administrator, is responsible for implementing and maintaining written personnel policies, proce-

dures, and job-descriptions that support sound resident care and personnel practices.

(2) Personnel records shall be kept current and available for each employee and contain information to support placement in the position to which the employee is assigned.

(3) Written policies for control of communicable disease are in effect to ensure that employees with symptoms or signs of communicable disease or infected skin lesions are not permitted to work.

(4) All employees shall have a pre-employment physical examination and subsequent annual physical examination. The physical examination must be completed and the report available when the employee reports for work.

(5) In case of an emergency where the needed personal care of a resident would suffer without the immediate employment of an individual, he may be temporarily employed, provided a physical examination is completed within a ten-day period.

(6) No employee shall be punished or harrassed by the facility or by its agent because of the efforts to avail himself of his rights.

(7) There shall be written policies that provide for the registration of employee complaints without threat of discharge or other reprisals.

(8) Report of health examinations will be filed in the employee's personnel record.

(D) Staff development. (1) There shall be an ongoing educational program

which is planned and conducted for the development and improvement of skills of all the facility's personnel, including training related to problems and needs of the aged, ill, and disabled.

(2) Each employee shall receive appropriate orientation to the facility and its policies and to his position and duties.

(3) There shall be inservice training which includes at least prevention and control of infections, fire prevention and safety, accident prevention, cofidentiality of resident information, psycho-social needs of residents, restorative nursing techniques, and preservation of resident dignity, including protection of his privacy and personal property rights.

(4) Written records shall be maintained which indicate the content of and

attendance at such staff development programs.

(E) Use of outside resources. (1) If the facility does not employ a qualified professional person to render a specific service to be provided by the facility, it shall make arrangements to have such a service provided by an outside resource, a person or agency that will render direct service to residents or act as a consultant to the facility.

(2) The responsibilities, functions, and objectives and the terms of agreement, including financial arrangements and charges of each such outside resource, shall be delineated in writing and signed by an authorized representative of the facility and the person or agency providing the service.

(3) The outside resource, when acting

as a consultant, shall apprise the administrator of recommendations, plans for implementation, and continuing assessment through dated, signed reports which are retained by the administrator for follow-up action and evaluation of performance.

(4) The facility shall not accept or shall discharge a resident requiring, according to attending physician's orders, the services of an unavailable qualified consultant.

(F) Admission policy. (1) A nursing home shall not obtain from or on behalf of residents any release from liabilities or duties imposed by the general law or these regulations, except as part of formal settlement in litigation.

(2) A nursing home shall admit only those residents whose nursing care and physical needs can be provided by the

staff and facility.

(3) All residents admitted shall be under the care of a physician licensed to practice in Kansas.

(4) Upon admission or within 48 hours of admission, referral information must be made available. Referral form shall include personal and social data of the resident, medical history, diagnosis, activities permitted, and such other information as to provide a continuum of care for the resident.

(5) Prior to admission, the prospective resident or his agent shall be informed in writing about the rates and charges and the resident's obligations regarding payment. This information shall include refund policies.

(6) At the time of admission, the licensee shall execute a written agreement

with the resident or his authorized agent which describes in detail all goods and services which the resident can expect to receive and which sets forth any obligations which the resident has toward the licensee.

(7) A resident who becomes mentally disturbed or whose social or medical condition changes after admission and who may cause injury to himself or others may be treated in the facility by appropriate medical management and supervision. If the resident cannot be managed, immediate arrangements shall be made by the attending physician for the transfer of the resident to an appropriate facility at the earliest practical time.

(8) As changes occur in the resident's physical condition which necessitate a change in care which the facility is not

prepared to give, immediate arrangements must be made to have the resident transferred to another appropriate facility which can care for the resident.

(9) When a resident's condition changes, it is not necessary to transfer a resident within or between facilities when, in the opinion of the attending physician, such transfer might be harmful to the physical and mental health of the resident. The physician must document accordingly on the resident's record.

(10) Residents with any disease in the communicable stage shall not be admitted to the facility.

(11) Residents who, in the opinion of a qualified physician, are not infectious and are receiving appropriate anti-tuberculosis chemotherapy may be admitted to the facility.

(12) A resident who develops a communicable disease after admission shall be medically isolated from other residents. If he cannot or should not be managed in the facility, immediate arrangements shall be made by the attending physician for the transfer of the resident to an appropriate facility at the earliest practical time.

(13) The fact that a resident develops a communicable disease after admission shall be reported to the appropriate health agencies.

(14) When a communicable disease develops, adequate steps shall be taken to determine the source and degree of dissemination of the disease.

(15) The following persons cannot be admitted as residents:

(a) Children under 16 years of age.

(b) Any woman who is pregnant or any woman within three months following pregnancy.

(c) Any person having a communicable disease.

(d) Any person in need of treatment for alcoholism or drug addiction.

(e) Any person who is a disturbed mental patient or any person for whom the continuous use of restraints is necessary for his protection or the protection of others.

(G) Residents' Personal Belongings. (1) Inventory of personal belongings should be completed at the time of admission.

(2) A written account shall be maintained on a current basis for each resident with written receipts for all personal possessions and funds received or

deposited with the facility and for all expenditures and disbursements made in behalf of the resident.

(3) No nursing home administrator shall handle a resident's personal funds without first being requested to do so in writing by the resident or his agent.

(H) Discharge Policy. (1) There shall be a centralized coordinated discharge plan to ensure that each resident has a program of needed continuing care both during his stay and after discharge from the facility. This plan must be developed within seven days of admission.

(2) Except in an emergency, a resident shall not be transferred or discharged from the facility without prior notification of next of kin or sponsor. Suitable clinical notes, list of orders, and all medications as directed by the attending

physician shall accompany the resident if he is sent to another medical facility.

(I) Notification of Change in Resident Status. (1) The facility shall have written policies and procedures which relate to notification of the resident's attending physician and other responsible persons in the event of significant change in the resident's physical, mental, or emotional status or resident's charges, billing, and related administrative matters.

(2) Except in a medical emergency, a resident shall not be transferred or discharged, nor shall treatment be altered radically without consultation with the resident, or if he is incompetent, without prior notification of next of kin or sponsor.

(J) Resident rights. (1) The licen-

see of the facility shall establish written policies regarding the rights and the responsibilities of residents and, through the administrator, is responsible for development of an adherence to procedures implementing such policies.

(2) These policies and procedures shall be made available to residents, any guardians, next of kin, sponsoring agency(ices), or responsible persons.

(3) There shall be available to staff, residents, consumer groups, and interested public, the policies of the facility, including a written outline of its objectives and a statement of the rights of its residents. These policies must set forth the rights of the residents and prohibit mistreatment and abuse of the residents.

(4) The staff of the facility shall be trained and involved in the implementa-

tion of these policies and procedures.

(5) The resident shall be fully informed, as evidenced by the resident's written acknowledgement prior to or at the time of admission and during stay, of these rights and of all rules and regulations governing resident conduct and responsibilities.

(6) The resident shall be fully informed, prior to or at the time of admission and during his stay, of services available in the facility and of related charges, including any charges for services not covered under medicare or medicaid programs or not covered by the facility's basic rate.

(7) The physician shall inform the resident of his medical condition unless it is medically contraindicated (as documented in the medical record) and the

resident shall be afforded the opportunity to participate in the planning of his medical treatment. The resident has the right to refuse to participate in experimental research.

(8) The resident shall be transferred or discharged only for medical reasons or for his welfare or that of other residents or for nonpayment for his stay. The resident shall be given advance notice to ensure orderly transfer or discharge. Such actions are documented in the resident's medical record.

(9) The resident is encouraged and assisted throughout his period of stay to exercise his rights as a resident and as a citizen and to this end may voice grievances and recommend changes in policies and services to facility staff and/or to outside representatives of his

choice, free from restraint, interference, coercion, discrimination, or reprisal.

(10) The resident may manage his personal financial affairs.

(11) If the facility accepts the responsibility for the resident's financial affairs, the resident must designate the transfer of responsibility in writing. Further, the facility must give the resident an accounting of all financial transactions made on the resident's behalf. This accounting must be done at least quarterly.

(12) The resident shall be free from mental and physical abuse. The resident shall also be free from chemical and (except in emergencies) physical restraints, except as authorized in writing by a physician for a specified and limited period of time or when it is necessary to protect the resident from injury to himself and to others.

(13) The resident shall be assured confidential treatment of his personal and medical records and may approve or refuse their release to any individual outside the facility, except in case of his transfer to another health care institution or as required by law or third-party payment contract.

(14) The resident shall be treated with consideration, respect, and full recognition of his dignity and individuality, including privacy in treatment and in care for his personal needs.

(15) The resident shall not be required to perform services for the facility that are not included for therapeutic purposes in his plan of care.

(16) The resident shall be permitted to associate and communicate privately with persons of his choice and to send and

receive his personal mail unopened, unless medically contraindicated (as documented by his physician in the medical record).

(17) The resident shall be permitted to participate in social and religious activities.

(18) The resident shall be permitted to meet with community groups at his discretion unless medically contraindicated (as documented by his physician in his medical record).

(19) The resident shall be permitted to retain and use his personal clothing and possessions unless to do so would infringe upon rights of other residents and unless medically contraindicated (as documented by his physician in his medical record).

(20) If married, the resident is assured privacy for visits by his/her spouse. If both are residents in the facility, they

are permitted to share a room unless medically contraindicated (as documented by the attending physician in the medical record).

(21) The aforementioned resident rights shall be reflected in the facility's policies and procedures.

(22) The resident shall have the right to choose his own pharmacy where goods and services for personal use are purchased except for prescription medications when the facility provides a "unit does" or similar medication distribution system.

(K) Development and review of resident care policies. (1) The facility shall have policies which are developed by the medical director or the organized medical staff with the advice of a group of professional personnel, including one or more physicians

and registered nurses, in the capacity of an advisory committee.

(2) The policies shall govern the supervised nursing care and medical care or other related services it provides.

(3) The policies, which shall be available to admitting physicians, sponsoring agencies, residents, and the public, shall reflect awareness of and provisions for meeting the total medical and psychosocial needs of residents, including admission, transfer, discharge planning, and range of services available to residents, including frequency of physician visits.

(4) These policies shall include provisions to protect residents' personal and property rights.

(5) Medical records and minutes of staff and committee meetings shall reflect that resident care is being rendered in

accordance with the written resident care policies.

(6) The facility shall appoint in writing a physician, a registered nurse, or a medical staff to be responsible for the execution of such policies.

(7) If the responsibility for day-to-day execution of resident care policies has been delegated to a registered nurse, the facility shall make available an advisory physician from whom she or he receives medical guidance.

(8) These policies shall be reviewed at least annually.

(9) The policies shall be designed to ensure that each resident receives treatments, medications, and diets as prescribed and rehabilitative nursing care as prescribed and as needed.

(10) The policies shall be designed to assure that the resident receives pro-

per care to prevent decubitus ulcers and deformities; that the resident is kept comfortable, clean, well-groomed, and protected from accident, injury, and infection; and that the resident is encouraged, assisted, and trained in self-care and group activities.

(L) Power of attorney and guardianship. (1) "Power of attorney" and/or guardianship shall not be assumed for any resident by anyone employed by or having a financial interest in the adult care home.

(2) When there is apparent incapacity of a resident to manage his affairs and there is no adverse family interest, the administrator shall notify the family to initiate guardianship proceedings.

(3) The administrator may initiate guardianship proceedings on behalf of the resident if he has no family or if

there is adverse family interest or if the family fails to act.

(M) Reports. (1) The administrator shall submit to the licensing agency, not later than ten days following the month covered, a monthly report of residents and employees. This report shall be submitted on forms provided by the licensing agency.

(2) A report of each accident which involves a resident shall be filed within 24 hours following the occurrence. The report shall be filed using forms provided by the licensing agency.

(3) The administrator shall submit any other reports required by statute or regulations.

(N) Resident's mail. All incoming mail shall be promptly delivered to the resident intact and unopened unless con-

traindicated by the resident's physician in writing for medical reasons. All outgoing mail dispatched by a resident shall be promptly mailed.

(O) Emergency telephone. Each facility shall maintain at least one noncoin operated telephone accessible to employees for use in emergencies. The names and telephone numbers of persons and places commonly required in emergencies shall be posted beside the telephone.

(P) Posting of regulations. All current regulations under the section entitled HEALTH SERVICES relating to personal hygiene and the entire section entitled REHABILITATIVE SERVICES shall be posted in a conspicuous location in the facility where they can be observed by both residents and visitors. (Authorized by K.S.A. 39-932; effective Feb. 15, 1977.)

42 C.F.R. §442.251 (1979)

§442.251 State licensing standards.

(a) Except as provided in paragraph (b) of this section, an ICF must meet standards for a State license to provide, on a regular basis, health-related care and services to individuals who do not require hospital or SNF care, but whose mental or physical condition requires services-

(1) Above the level of room and board; and

(2) That can be provided only by an institution.

(b) An ICF that formerly met State licensing standards but does not currently meet them may continue to receive Medicaid payments as a qualified provider during a period specified by the State authority responsible for licensing the facility if,

during that period, the ICF takes the steps needed to again meet the standards.

(c) An ICF operated by a government agency must meet the licensing standards that apply to the same type of facility operated under any other ownership.

(d) In accordance with §431.110 of this subchapter, an Indian Health Service ICF must meet State licensing standards although it need not obtain a license. In making this determination, the licensing authority may not take into account an absence of licensure of any staff member of the facility.